No. 89-1348

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In The

Supreme Court of the United States

October Term, 1989

DESISTO COLLEGE, INC. and LOREN E. HORNER,

Petitioners,

vs.

THOMAS P. LINE, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

EVAN SLAVITT
Counsel of Record
RODERICK MacLEISH, JR.
B. ANDREW ZELERMYER
FINE & AMBROGNE
Attorneys for Petitioners
Exchange Place
Boston, Massachusetts 02109
(617) 367-0100

10195
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I. QUESTION PRESENTED FOR REVIEW

Does Federal Rule of Civil Procedure 11, which states that an attorney's signature on a pleading certifies that the argument "is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law," require counsel to inform the court when counsel is arguing "for the extension, modification, or reversal of existing law?"

II. INTERESTED PARTIES

Petitioners

DeSisto College, Inc.
Loren E. Horner

Respondents

Thomas P. Line
Paul Mazade
The Town of Howey-in-the-Hills
Arthur Pratt
Alan B. Mills
Rodney T. Griffin
John P. Purser, III
Carlin Washo

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STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

V. OPINIONS OF COURTS BELOW

The opinion of the court below, DeSisto College, Inc. v. Line, 888 F.2d 755 (11th Cir. 1989), is annexed hereto as Appendix A. The opinion of the United

States District Court for the Middle District of Florida, DeSisto College, Inc. v. Line, No. 87-1-Civ-Oc-14 (M.D. Fla. March 31, 1988) is annexed hereto as Appendix B.

VI. JURISDICTION

The judgment of the court below was entered on November 15, 1989. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

VII. RULE INVOLVED

Federal Rule of Civil Procedure 11:

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's

pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal

of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the

filing of the pleading, motion, or other paper, including a reasonable attorney's fee. (emphasis supplied).

VIII. STATEMENT OF THE CASE

The DeSisto High School operated from 1980 to 1988 as a non-profit corporation serving high school students with emotional problems in the Town of Howey-in-the-Hills, Florida (the "Town"). In 1985, one of the officers of DeSisto High School began preparations to open DeSisto College, Inc. (the "College"), to serve similar students at the college level.[1/] In the fall of 1986, certain town officials began to take actions both openly and secretly, in conjunction with certain private parties designed to

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1/ DeSisto College, Inc., a Florida not-for-profit corporation, has no parent companies or subsidiaries.

frustrate this purpose. These actions included secret meetings, involvement with a "concerned citizen" group, and the making of inaccurate and inflammatory statements to the media.

This clandestine activity caused the College, together with two DeSisto College students, Loren E. Horner and Keith Murphy,[2] to file a law suit seeking injunctive relief against certain town officials acting in their individual capacities.[3] The College's complaint alleged violations of the due process and equal protection clauses, as well as of 42

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[2] Keith Murphy withdrew as a Plaintiff before the filing of the Second Amended Complaint.

[3] For purposes of this petition the actions of Loren E. Horner will not be distinguished from those of the College.

U.S.C. § 1983. The jurisdiction of the district court was invoked under 28 U.S.C. § 1331 and 42 U.S.C. § 1983.

The College filed a Second Amended Complaint on July 10, 1987. Later that fall, the court issued its decision on the Defendants' Motion to Dismiss the [Second Amended] Complaint. In its decision, the district court specifically rejected the arguments that: (1) the case should be dismissed because the Defendants had qualified immunity; and (2) the case should be dismissed because the College had sued individual Defendants in their official capacities. The court did accept the argument that the individual defendants had legislative immunity, but only to the extent that their legislative actions formed the basis for the College's claims.

Accordingly, the court dismissed the College's Complaint to the extent that the causes of action were based on the enactment of zoning ordinances (legislative activity) and declined to dismiss the individual Defendants in their individual capacities to the extent that the College could hold them responsible for non-legislative activities.

The College filed a Third Amended Complaint on December 7, 1987. The Town immediately sought dismissal based in part upon its assertion that the format of the Complaint did not comply with the court's order on the Town's Motion to Dismiss the Second Amended Complaint. On March 31, 1988, the district court granted the Defendants' Motion to Dismiss the Third Amended Complaint for violation of the

court-established format. The court also imposed Rule 11 sanctions: five thousand dollars for the format problem in the Third Amended Complaint and one thousand dollars with respect to the Second Amended Complaint's inclusion of two Defendants whose activities were not alleged to be other than purely legislative.

The district court premised its one thousand dollar sanction on its finding that the College's counsel, Roderick MacLeish, Jr., had relied upon Cutting v. Muzzey, 724 F.2d 259, 261 (1st Cir. 1984), for his interpretation of legislative immunity without explicitly alerting the court to the fact that the holding in Cutting was contrary to the precedent of the Eleventh Circuit. DeSisto College, Inc. v. Line, No. 87-1-Civ-Oc-14 at 9

(M.D. Fla. March 31, 1988) (Appendix B at 74A-75A)(citing Espanola Way Corp. v. Meyerson, 690 F.2d 827, 829 (11th Cir. 1982), cert. denied, 460 U.S. 1039 (1983); Hernandez v. City of Lafayette, 643 F.2d 1188, 1193 (5th Cir. 1981); Universal Amusement Co., Inc. v. Hofheinz, 616 F.2d 202, 205 (5th Cir. 1980)).

The College appealed the award of sanctions to the United States Court of Appeals for the Eleventh Circuit, and the Eleventh Circuit affirmed the district court. DeSisto College, Inc. v. Line, 888 F.2d 755 (11th Cir. 1989) (Appendix A). This petition seeks review of that portion of the opinion of the Court of Appeals which affirmed the district court's imposition of the one thousand dollar sanction on Mr. MacLeish for his failure

to confess to the court that the College was advocating a theory of legislative immunity that had not been adopted by the Eleventh Circuit.

In the spring and summer of 1988, the substantive case was decided by the district court and was affirmed by the Eleventh Circuit on November 15, 1989. DeSisto College, Inc. v. Line, 888 F.2d 766 (11th Cir. 1989). On February 14, 1989, the Town reopened the case at the trial level to seek costs and fees under 42 U.S.C. § 1988 and sanctions under Fed. R. Civ. P. 11. On June 29, 1989, the district court denied sanctions under Rule 11, but awarded the Town costs and fees under Section 1988. In July, 1989, the College appealed and the Town cross-appealed. These appeals are pending

before the Eleventh Circuit. DeSisto College, Inc. v. Line, 89-3559 (11th Cir. 1990).

IX. ARGUMENT

A. The Eleventh Circuit's Interpretation Of Rule 11 Is In Direct Opposition To Two Circuit Courts Of Appeals

The Eleventh Circuit's construction of Rule 11, which requires an attorney to identify in briefs or memoranda when that attorney is arguing for a reversal, extension, or modification of existing law, is in direct conflict with the interpretations of two United States Courts of Appeal. See DeSisto College, Inc., 888 F.2d at 766, n.20 (11th Cir. 1989) (Appendix A at 55a n. 20) (acknowledging that two circuits had rejected the Eleventh Circuit's interpretation of Rule

11); Mary Ann Pensiero, Inc. v. Lingle, 847 F.2d 90 (3rd Cir. 1988); Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531 (9th Cir.), reh'g denied, 809 F.2d 584 (1987) (five judges dissenting from denial to rehear and arguing for adoption of "argument identification" interpretation of Rule 11).

B. The Eleventh Circuit's Interpretation Of Rule 11 Conflicts With An Attorney's Duty Zealously To Represent His or Her Client

"The 'argument identification' requirement adopted by the [Eleventh Circuit] . . . create[s] a conflict between the lawyer's duty zealously to represent his client, Model Code of Professional Responsibility Canon 7, and the lawyer's own interest in avoiding rebuke." Golden Eagle, 801 F.2d at 1540.

In Golden Eagle, the district court sanctioned an attorney under Rule 11 for implying that his position was "'warranted by existing law,'" rather than stating that the position he argued was grounded in a "'good faith argument for the extension, modification, or reversal of existing law.'" Id. at 1534. The district court in Golden Eagle held that Golden Eagle had failed to cite contrary authority and had thus violated the ethical duty of candor under the Model Rules of Professional Conduct. Id. The Ninth Circuit reversed the court's interpretation of Rule 11 and held that the district court's "argument identification" requirement was contrary to the intent of Rule 11 and would "chill an attorney's enthusiasm or creativity . . . ." Id. at

1540 (quoting Advisory Committee Note, 97 F.R.D. at 99). See Mary Ann Pensiero, Inc., 847 F.2d at 94 ("[T]he rule should not be applied to adventuresome, though responsible, lawyering which advocates creative legal theories.").

Moreover, the Eleventh Circuit's adoption of the "argument identification" theory creates an undue burden on counsel, who in effect must serve as zealous advocate, opposing counsel, and judge.

> [N]either Rule 11 nor any other rule imposes a requirement that the lawyer, in addition to advocating the cause of his client, step first into the shoes of opposing counsel to find all potentially contrary authority, and finally into the robes of the judge to decide whether the authority is indeed contrary or whether it is distinguishable. It is not in the nature of our adversary system to require lawyers to demonstrate to the court that they have exhausted every theory both for and against their client. Nor does that requirement

> further the interests of the court. It blurs the role of judge and advocate.

Golden Eagle, 801 F.2d. at 1542.

C. The Eleventh Circuit's Duty of Candor Requirement Is Contrary to a Legal System Based on Stare Decisis

The Eleventh Circuit stated that its sanction was premised upon Mr. MacLeish's failure "to acknowledge . . . that the binding precedent of this circuit disfavored Plaintiffs' position on legislative immunity." DeSisto, 888 F.2d at 766 (Appendix A at 54a-55a). What the Eleventh Circuit failed to consider was that this interpretation of Rule 11 would impose mandatory sanctions on "close decisions concerning whether or not one case is or is not the same as another." Golden Eagle, 801 F.2d at 1542 (reversing

sanction when attorney cited authority directly in conflict with controlling precedent and did not cite controlling precedent). Moreover, "[w]hether the case being litigated is or is not materially the same as earlier precedent is frequently the very issue which prompted the litigation in the first place." Id. at 1541.

The Eleventh Circuit's interpretation of Rule 11 creates an unreasonable standard, the imposition of which will have a profound and detrimental impact upon the quality and effectiveness of the adversary process.

First, at the trial level, counsel will often be unable to determine whether their arguments violate Rule 11, because the distinction between an argument for an

extension of existing law -- to meet the particular facts of the case before the court -- as opposed to a reversal of existing precedent is often obscure and sometimes not discernable. For example, "[a]t what point after 1896 and before 1954 would a lawsuit trying to undo the separate but equal doctrine have ceased to be a frivolous lawsuit under this interpretation of Rule 11?" Grosberg, Illusion and Reality in Regulating Lawyer Performance: Rethinking Rule 11, 32 Vill. L. Rev. 575, 599 (1987). A requirement that counsel specify that he or she is attempting to change the law, as opposed to simply arguing for an extension of the existing law to a new set of facts, would lead to ineffective advocacy in a

system which relies upon the doctrine of stare decisis. Id. (citing Golden Eagle, 801 F.2d at 1540).

Second, the Eleventh Circuit's Opinion implies that counsel could avoid Rule 11 sanctions simply by inserting a protective footnote into every brief and memoranda, which stated that "arguably the foregoing discussion could be interpreted as arguing for the extension, modification, or reversal of existing law." Presumably, had DeSisto College's counsel written such a footnote, he would not have been sanctioned. See DeSisto College, 888 F.2d at 766 (Appendix A at 54A-55A). Such a disclaimer would protect counsel from sanctions, but at the substantial cost of

undercutting the merits of his or her legal theory and providing no additional guidance to the court.

D. The Eleventh Circuit's "Argument Identification" Requirement Is Not Found Within the Plain Meaning of Rule 11

This Court has held that "[w]e give the Federal Rules of Civil Procedure their plain meaning, Walker v. Armco Steel Corp., 446 U.S. 740, 750, n.9 (1980), and, . . . as with a statute, '[w]hen we find the terms . . . unambiguous, judicial inquiry is complete.' Rubin v. United States, 449 U.S. 424, 430 (1981)." Pavelic & LeFlore v. Marvel Entertainment Group, 110 S.Ct. 456, 458 (1989). The specific provision of Rule 11 at issue provides:

> [t]he signature of an attorney . . . constitutes a certificate by the signer that the signer has read the

> pleading, motion, or other paper; that to the best of the signer's knowledge, information and belief formed after reasonable inquiry it . . . is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.

The Eleventh Circuit's construction of the "good faith" language in Rule 11 as requiring counsel to identify any argument that is for an "extension, modification, or reversal of existing law" as such is in conflict with a plain reading of the Rule, as well as with the Advisory Committee Notes. The Rule requires counsel to make good faith arguments. The Rule does not require counsel to specify which of his arguments seek an extension, modification, or reversal of existing law, nor is the presence of good faith to be determined by whether such specification is made. Cf.

Cavanagh, Developing Standards Under Amended Rule 11 of the Federal Rules of Civil Procedure, 14 Hofstra L. Rev. 499, 543 (1986) (asserting that it is clearly reasonable under Rule 11 to plead the law of another circuit if the settled law of the circuit does not support the claim). The Eleventh Circuit's "argument identification" requirement essentially amends Rule 11 by imposing a requirement which the plain language of the Rule does not support.

The Eleventh Circuit's reading of the Rule also conflicts with the Advisory Committee Notes which admonish the courts not to use the Rule "to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories" or to engage in hindsight when imposing

sanctions. Advisory Committee Notes, 97 F.R.D. 165, 199 (1983). See supra at 14-15. Given the plain meaning of the Rule, the Advisory Committee Notes, and the existing duty to zealously represent one's clients, the authors of Rule 11 could not have intended for such an overbroad construction of the good faith requirement as that which is mandated by the Eleventh Circuit's interpretation.

E. The Eleventh Circuit's Reading of Rule 11 Cannot Be Applied Post-Hoc

If this Court allows the Eleventh Circuit's interpretation of Rule 11 to remain as controlling precedent in that Circuit, the Court should reverse the one thousand dollar sanction imposed upon Mr. MacLeish. The Petitioners submit that given the split among the United States

Courts of Appeals, and the lack of precedent in the Eleventh Circuit on the good faith requirement of Rule 11, the Eleventh Circuit erred in affirming, and the district court in imposing, the sanction. To allow courts to sanction counsel under constructions of Rule 11 that have yet to become binding precedent is contrary to any notion of judicial fairness or administrative efficiency.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this petition for certiorari be granted.

Respectfully submitted,

By: Evan Slavitt

Evan Slavitt,
Counsel of Record

Roderick MacLeish, Jr.
B. Andrew Zelermyer
FINE & AMBROGNE
Exchange Place
Boston, MA 02109
Tel: (617) 367-0100

APPENDIX A

DeSISTO COLLEGE, INC. and
Loren E. Horner,
Plaintiffs-Appellants

v.

Thomas P. LINE, et al.
Defendants-Appellees.

No. 88-3333.

United States Court of Appeals,
Eleventh Circuit.

Nov. 15, 1989.

Appeal from the United States Court for the Middle District of Florida.

Before FAY and HATCHETT, Circuit Judges, and ALLGOOD*, Senior District Judge.

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* Honorable Clarence W. Allgood, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

FAY, Circuit Judge:

This appeal involves the propriety of Federal Rule of Civil Procedure 11 ("Rule 11") sanctions imposed on counsel for Plaintiffs-Appellants ("Counsel") for signing pleadings without having first made reasonable inquiry into the facts and the law of the case. The district court found, first, that Counsel neglected to follow the court's instructions on restructuring the Second Amended Complaint to form the Third Amended Complaint, and instead signed and filed a Third Amended Complaint which violated the court's order. Second, the court found that Counsel, in signing the Second Amended Complaint and its predecessors, had subjected two defendants to unwarranted

litigation to which they would not have been exposed had counsel sufficiently researched this Circuit's precedent on legislative immunity. For those reasons, the district court ordered Counsel to pay the attorneys for Defendants $6,000 as a sanction. Counsel challenges the above findings and the sanction of the trial court. We hold that the district court did not err in sanctioning Counsel and therefore AFFIRM the actions taken by the district court.

FACTS

On January 2, 1987, Plaintiffs-Appellants, DeSisto College ("the College" or "DeSisto"), an institution created to serve students with learning disabilities and emotional disturbances, and Loren

Horner, a DeSisto student, file a complaint through their attorney, Roderick MacLeish, against Defendants-Appellees, Paul Mazade and Thomas Line.[1] Also included as defendants were Arthur Pratt, Alan Mills, Rodney Griffin, John Purser, and Carlin Washo, who are not involved in this appeal. Defendants were sued both individually and in their official capacities as members of the Howey-in-the-Hills Zoning Commission or Town Council. The twenty-five page complaint alleged two counts of deprivation of protected rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States

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[1] Keith Murphy, another DeSisto student, was also originally a plaintiff in this case, but later withdrew.

Constitution in violation of 42 U.S.C. § 1983 and one count of discrimination against the handicapped in violation of § 504 of the Rehabilitation Act, 29 U.S.C. § 794. In essence, Plaintiffs accused Defendants of unconstitutionally and illegally manipulating and deliberately misconstruing Howey-in-the-Hills' zoning ordinances, as well as abusing their official positions, to deny Plaintiffs the opportunity to establish DeSisto College on the town of Howey-in-the-Hills.

Plaintiffs exercise their right to amend their pleadings as a matter of course, filing a First Amended Complaint with the district court on January 15, 1987. This complaint comprised twenty-eight pages. In it, Plaintiffs joined the

town of Howey-in-the-Hills ("the Town" or "Howey") as a defendant, added a fourth count alleging facts making a declaratory judgment necessary, and appended a request for a declaratory judgment stating that Town officials' enforcement of the old zoning ordinances against the College and passage of new zoning ordinances affecting the College were unconstitutional.

Two weeks later, defendant Line made a motion to dismiss the First Amended Complaint for failure to state a claim under either 42 U.S.C. § 1983 or § 504 of the Rehabilitation Act. Upon stipulation by Plaintiffs of dismissal of the Rehabilitation Act count, the district court granted Line's motion to dismiss that count in the First Amended Complaint.

The court otherwise denied Line's motion, finding that Plaintiffs had sufficiently stated causes of action for violations of due process and equal protection in the other counts of the complaint. Subsequently, the other defendants made a motion to dismiss the First Amended Complaint. While that motion was pending, however, the magistrate ordered Plaintiffs to file a second amended complaint, which was done on July 10, 1987. Consequently, Defendants' motion to dismiss the First Amended Complaint was denied by the court as moot.

The Second Amended Complaint expanded the previous complaint by fifty-one pages containing 174 paragraphs, ten counts and ten separate requests for relief. The

first forty-one pages comprised 139 sizable paragraphs of factual allegations concerning various actions of the College and College personnel, the Defendants, and persons uninvolved in the lawsuit, from 1971 through 1987. In the succeeding thirty-eight paragraphs, Plaintiffs alleged that Defendants, by their actions in the preceding 139 paragraphs, had violated Plaintiffs' due process and equal protection rights under the United States and the Florida Constitutions.2/

2/ Specifically, Plaintiffs enumerated four separate counts of violations of 42 U.S.C. § 1983, one count for federal declaratory judgment under 28 U.S.C. §§ 2201 and 2202, two counts for declaratory judgment under Fla.Stat. §§ 86.011 et seq., and one count of violation of Article 1, § 2 of the Florida Constitution. In addition, Plaintiffs alleged violations of Fla.Stat. §§ 163.3215 and 166.041.

Defendants thereupon filed a motion to dismiss the Second Amended Complaint for failure to state a claim upon which relief could be granted. Defendants Pratt, Griffin, Mazade, Purser, Line and Washo moved to have the suit dismissed against them both in their individual and official capacities; defendant Mills moved for dismissal of the suit against him in his official capacity only.

In their memorandum of law supporting their motion to dismiss, Defendants enumerated five grounds for their belief that Plaintiffs had failed to state a cause of action against Defendants. First, Defendants claimed that the complaint violated Fed.R.Civ.P. 8(a) and

(3) ("Rule 8")[3] in that the complaint did not make a "short and plain statement of the claim" and was not "simple, concise, and direct." Further, Defendants averred that the complaint contained many allegations which were extraneous, immaterial, irrelevant, and/or derogatory. Because of these defects in the complaint, Defendants could not figure out without excessive sifting which allegations pertained to which count or theory of liability. Moreover, the complaint did not specify which defendants were liable for the

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[3] Fed.R.Civ.P. 8 states in pertinent part:

(a) A pleading which sets forth a claim for relief . . . shall contain . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief[.]

(e)(1) Each averment of a pleading shall be simple, concise, and direct.

various wrongs alleged by Plaintiffs. On this basis, Defendants requested that the court dismiss or strike the complaint.

Second, Defendants maintained that a § 1983 cause of action required Plaintiffs to have first exhausted all state administrative and judicial remedies, and that Plaintiffs had failed to do so.

Third, Defendants argued that Plaintiffs had no cognizable cause of action against Defendants in their individual capacity, as Plaintiffs alleged wrongs involving Defendants' performance of legislative and administrative functions regarding zoning and Town management. In such activities, Defendants contended, the law grants persons carrying out

legislative duties absolute immunity and persons executing administrative tasks qualified immunity from suit.

Defendants then declared that no cause of action existed against them in their official capacities, asserting that the Federal Rules of Civil Procedure discouraged the naming of officeholders in pleadings, preferring that the office be sued, and that the real remedy lay against the Town of Howey and not the Defendants in their official capacity.

Finally, Defendants stated that Plaintiffs had failed to allege any violation of Plaintiffs' due process or equal protection rights, contending that the zoning ordinances challenged by Plaintiffs

were all lawfully and constitutionally created and enforced and that no discrimination occurred.

Plaintiffs in response refuted the assertions of Defendants. Specifically, they maintained that the complaint did in fact fully comport with the Federal Rules governing pleadings. They justified the length of their complaint on the ground that the case was complex, with multiple parties on both sides and involved several transactions over a substantial period of time. Plaintiffs further asserted that the material which Defendants described as extraneous was in fact relevant to the case even if such allegations did not all directly involved parties to the suit. In addition, Plaintiffs denied that the

manner in which the complaint was pled affected the liability of Defendants in their official capacities. Plaintiffs argued that Defendants were incorrect about the need to exhaust all other remedies before bringing a § 1983 action and that due process and equal protection violations had taken place which should be remedied under § 1983. Finally, Plaintiffs claimed that an exception to absolute legislative immunity that exists for legislators acting in an administrative fashion applied to Plaintiffs' case, and that Defendants lacked the good faith necessary to benefit from the qualified privilege accorded administrative functionaries.

The district court in considering Defendants' motion to dismiss and Plaintiffs' opposition decided for the Plaintiffs on most of the alleged grounds for dismissal. The court flatly rejected Defendants' exhaustion argument as an incorrect statement of the law. The court also implicitly refused to dismiss the complaint for failing to allege any infringement of Plaintiffs' constitutional rights, although the court's order nowhere expressly denied Defendants' motion on such grounds. The court further allowed Plaintiffs to sue Defendants in both individual and official capacities.

Regarding individual capacity, however, the court found that the law of this Circuit entitled local legislators to

absolute immunity unless the legislators act outside of their legislative role. While the court recognized three different tests created by the First, Third and Fifth Circuits, respectively, to ascertain when a legislator is acting within his/her role, the court was persuaded by the Fifth Circuit test which is also binding precedent in this Circuit. Under the Fifth Circuit test, a local legislator is granted absolute immunity for all actions taken in furtherance of legislative duties. Thus, to the extent that Defendants were allegedly liable for activities such as voting, debate and response to public opinion, the court found that Defendants were absolutely immune from suit. Since the complaint

also alleged that Defendants engaged in enforcement activities which are not legislative, however, the court found that Plaintiffs could pursue Defendants individually for such activities. The court further held that the affirmative defense of qualified immunity did not constitute a basis for dismissal of the suit.

The court went on to say, however, that because the Second Amended Complaint mingled impermissible claims based on Defendants' legislative activities with legitimate causes of action premised on Defendants' administrative acts, the court would dismiss the Second Amended Complaint with leave to amend to include only the latter type of claims.

> [T]he Court will leave it up to the plaintiffs to sort through their complaint and make it clear what administrative activities, if any, are attributable to each defendant.

Order of November 10, 1987, at 13.

Finally, the court agreed with the plaintiffs that the complaint was not too long, given the complexity of the case and the number of parties involved. In fact, the court gently chided the Defendants for not appreciating the specificity of such a detailed complaint which put Defendants on notice of what Plaintiffs intended to prove. Because the court would require Plaintiffs to file a further amended complaint, however, the court in its order gave explicit instructions for restructuring the Second Amended Complaint:

5. a. The plaintiffs shall plead each count and the facts supporting each count separately.

b. The plaintiffs shall plead separate counts for each defendant.

c. That plaintiffs shall plead counts based on defendants' actions in their individual capacities separately from counts based on defendants' actions in their official capacities.

Id. at 16-17. The court acknowledged that this format would lengthen the complaint and make it somewhat repetitious but anticipated that such pleading would clarify the issues being litigated.

Plaintiffs submitted their Third Amended Complaint to the court on December 7, 1987 - 105 pages and 556 paragraphs long. Included as defendants were Line, Pratt, Mills and Griffin, individually and as members of the Zoning

Commission; Mazade, individually, as Mayor of Howey and as a Town Council member; and the Town itself.[4/] Plaintiffs did plead each count separately and pled separate counts against each defendant, as ordered by the court. The separate counts against each defendant, however, did not specify whether the defendant was being held liable in his individual or official capacity; the counts merely addressed each defendant by name. Further, in the facts supporting each count, Plaintiffs apparently did no more than state and restate under each count identical paragraphs from the Second Amended Complaint, merely cutting and pasting the paragraphs so that each count somewhat

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4/ Defendants Purser and Washo were voluntarily dismissed from the suit by Plaintiffs.

addressed the specific actions of the defendant named. For example, each count begins with a statement of the parties, the first two paragraphs redundantly describing who the plaintiffs are[5] and the third describing the defendant against whom the count is alleged.[6] Finally, the 105 pages and 556 paragraphs comprised

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[5] 1. Plaintiff DeSisto College, Inc. is a Florida not-for-profit corporation. The College is located in Howey-in-the-Hills, Florida. The College is licensed by the Florida State Board of Independent Colleges and Universities and provides an intensive therapeutic and educational program for students with learning disabilities and emotional disturbances.

2. Plaintiff Loren E. Horner is a student at the College. Plaintiff Horner's address is 411 South Palm Avenue, Howey-in-the-Hills, Florida.

These two paragraphs occur nine times within the complaint and are only one example of the repetition contained therein.

[6] Including four separate, identical descriptions of the Town of Howey.

only nine counts, requiring each defendant still to sift through an average of 62 paragraphs and 11 1/2 pages of background facts to find out in exactly what way he was alleged to have harmed Plaintiffs.

Defendants responded by making a motion to dismiss the Third Amended Complaint and for sanctions against the Plaintiffs. In the memorandum accompanying the motion, Defendants alleged a host of defects in the complaint, but the gravamen of the request for sanctions was that, after a year of ongoing litigation and explicit judicial instructions on the proper format for the complaint, Plaintiffs had failed to file a sufficient complaint stating a legal basis for their claims. Defendants accused

Plaintiffs of defying the court's order by not clearly delineating the capacities in which claims were being made against Defendants and continuing to request relief against Defendants as individuals for official actions for which they were immune. Further, Defendants requested that the court levy Rule 11 sanctions against Counsel for Plaintiffs, not only for signing the defective Third Amended Complaint, but also for needlessly signing and pursuing claims against erstwhile-defendants Purser and Washo for nearly a year when the law of this Circuit clearly provided Purser and Washo with absolute immunity from suit for their legislative activities.

Plaintiffs first moved to amend their Third Amended Complaint to add a phrase to the five counts not directed against the Town to indicate that these five counts named the defendants in their individual capacity. That motion was denied. Plaintiffs then filed their opposition to Defendants' motion to dismiss and for sanctions, taking the position that the Third Amended Complaint fully comported with the district courts' order of November 10, 1987. Plaintiffs contended that their complaint clearly directed the official capacity allegations against the Town, with the remaining counts addressing the Defendants as individuals, and that they further explained their intentions in a telephone conversation with counsel for

Defendants in mid-December. In addition, Plaintiffs stated that they "scrupulously observed the Court's observations regarding the distinction between the Defendants' activity related to enactment as opposed to activity related to enforcement."7/ Plaintiffs also asserted that the repetitious nature of the complaint was necessary to "render each count comprehensible." Id. at 11. Finally, Plaintiffs argued that they did not violate Rule 11 in including Washo and Purser as defendants in the past. Rather, Plaintiffs asserted that until the district court entered its order of November 10, 1987, establishing the law

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7/ Plaintiffs Memorandum In Support of Their Opposition to Defendants' Motion to Dismiss Plaintiffs' Third Amended Complaint and For Sanctions, at 6.

that would govern the case, a number of tenable legal arguments existed which supported their theory of liability on the part of these two ex-defendants.

The district court, in its order addressing the motion to dismiss and for sanctions, found that Plaintiffs' Third Amended Complaint violated the November 10 order in not separating the counts for Defendants' actions taken in their individual capacity from those taken in their official capacity, and in not pleading each count and the facts supporting each count separately but rather "again lump[ing] all of the defendants' actions together nine times." Opinion and Order of March 31, 1988, at 4. The court observed that the Third Amended

Complaint obscured Plaintiffs' claims instead of clarifying them, particularly in identifying what conduct of each defendant violated Plaintiffs' constitutional rights. Finally, the court disagreed with Plaintiffs that the flaws in the complaint could be remedied by simple amendment. Instead, the court dismissed the Third Amended Complaint and gave the three pages of even more explicit instructions on how the Fourth Amended Complaint should be structured.

On the question of sanctions, the court held that Mr. MacLeish, Counsel for Plaintiffs, had taken a position on the issue of legislative immunity insupportable under the precedent of this Circuit and that his reliance on a First Circuit

case was "unreasonable and could not have been conducted after reasonable inquiry." Id. at 9. On that basis, the court also found that inclusion of Washo and Purser as defendants in the first three complaints was done without reasonable inquiry. Additionally, the court determined that Mr. MacLeish signed the Third Amended Complaint without carefully reading and following the court's directives contained in the November 10 order. Thus the court imposed two sanctions for signing pleadings in violation of Rule 11,[8] $1000 for signing the Second Amended

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8/ Fed.R.Civ.P. 11 states in relevant part

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least on attorney of record in the attorney's individual name[.] . . . The signature of an attorney or party constitutes a certificate by the

(footnote continued)

Complaint including Washo and Purser as defendants and $5000 for filing the Third Amended Complaint in violation of the court's previous order. Both figures represented the court's estimation, based on figures submitted by counsel for Defendants, of the expenses incurred by Defendants' attorneys to respond to the pleadings signed in violation of Rule 11.

(footnote continued from previous page)
signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law[.] . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it . . . an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

I. JURISDICTION

Before we address the merits, we must first determine our jurisdiction to hear this appeal. Clearly, the sanctions imposed by the district court were part if an intermediate order and not a final decision appealable under 28 U.S.C. § 1291.9/ Nor do any of the categories of interlocutory orders granted immediate appealability under 28 U.S.C. § 1292 apply to this case. The Supreme Court, however,

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9/ 28 U.S.C. § 1291 (1982) provides that "[t]he courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States, . . . except where a direct review may be had in the Supreme Court." The Supreme Court had described a final decision as "one which ends the litigation on the merits and leaves nothing for the court to do by execute the judgment." Catlin v. United States, 324 U.S. 229, 233, 65 S.Ct. 631, 633, 89 L.Ed. 911 (1945) (citing St. Louis, I.M. & S.R.R. Co. v. Southern Express Co., 108 U.S. 24, 28-29, 2 S.Ct. 6, 8, 27 L.Ed. 638 (1883)).

in Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949), determined that the concept of finality expressed in § 1291 should be given a practical rather than a strict construction. Creating what would become known as the collateral order doctrine, the Court authorized appellate review of conclusively determined claims, separable from and collateral to the merits, too important to be denied review, and too independent of the merits to justify deferring review until final disposition of the whole case. Id. at 546, 69 S.Ct. at 1225. See also Coopers & Lybrand v. Livesay, 437 U.S. 463, 468, 98 S.Ct. 2454, 2458, 57 L.Ed.2d 351 (1978) (granting practical finality to trial court orders

conclusively determining a disputed question, resolving an important issue completely separate from the merits, and effectively unreviewable on appeal from final judgment).10/

This circuit has followed the Supreme Court in implementing the collateral order doctrine. See, e.g., Robinson v. Tanner, 798 F.2d 1378, 1380-81 (11th Cir. 1986), cert. denied, 481 U.S. 1039, 107 S.Ct. 1979, 95 L.Ed.2d 819 (1987); Haitian

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10/ Counsel for Plaintiffs-Appellants also argues that we may take jurisdiction under the "Forgay-Conrad" rule expressed in Forgay v. Conrad, 47 U.S. (6 How.) 201, 12 L.Ed. 404 (1848), which allows review of an interlocutory order that directs immediate delivery of physical property and subjects the losing party to irreparable harm if review is delayed until the conclusion of the case. We believe that the collateral order doctrine of Cohen is sufficient to dispose of the issue of jurisdiction. We therefore do not address the applicability of the Forgay-Conrad rule.

Refugee Center v. Meese, 791 F.2d 1489, 1493-94 (11th Cir. 1986); United States v. C.G., 736 F.2d 1474, 1476 (11th Cir. 1984); Matter of Covington Grain Co., Inc., 638 F.2d 1357, 1360 (5th Cir. 1981).[11/] Further, this court had held that discovery sanction orders are immediately appealable when the sanction was against "a non-party who might not be able to obtain review from a final judgment," Robinson, 798 F.2d at 1381 (citations omitted), and that such a principle would hold for sanctions ordered under Rule 11. Id. at 1380 n. 4.

11/ The Eleventh Circuit in Bonner v. City of Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981), adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

The case of Ortho Pharmaceutical Corp. v. Sona Distributors, 847 F.2d 1512 (11th Cir. 1988), is most apposite to the subject case. In Ortho, plaintiffs sued defendant and defendant moved to dismiss for lack of personal jurisdiction. Only after plaintiff spent several thousands of dollars in defending the motion to dismiss did defendant drop what the trial court found to be a meritless, unreasonable defense. On motion of the plaintiff, the trial court assessed Rule 11 sanctions against defendant and defendaht's attorneys in the amount of $35,851.55, payable "forthwith." Id. at 1515. When defendant filed an appeal to challenge the sanctions, this court stated that "[w]hen a Rule 11 sanctions [sic] directs a non-

party . . . to pay immediately-that is, before entry of final judgment--significant attorney fees and costs, this court has jurisdiction to hear immediate appeal of the sanction order." Id.12/

We believe that the instant case is sufficiently comparable to Ortho to warrant similar treatment. This case, like Ortho, meets the elements set out in Cohen. The order sanctioning Mr. MacLeish was the final disposition of the propriety of his signing the Second and Third Amended Complaints, an issue entirely

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12/ We noted, however, that the size of the sanction was an important factor in our decision. "[N]ot all immediately payable sanctions imposed under Rule 11 (or other rules) will be appealable under the collateral order exception. While the issue may be separable and discrete from the central controversy of the case, the small size of the sanction will not meet the 'significant issue' component of the second criterion under Cohen." Ortho, 847 F.2d at 1516.

distinct from the merits of the action brought by Plaintiffs-Appellants. Mr. MacLeish was ordered to pay substantial attorney fees to Defendants' counsel within 20 days, for all practical purposes "forthwith." Finally, as Plaintiff-Appellants' brief points out, without immediate review, counsel's right to challenge the sanctions might be forever lost should the parties, for example, elect to settle their dispute before final judgment were entered by the court or if Plaintiffs-Appellants decided not to appeal whatever final judgment the trial court rendered. We therefore hold that we have jurisdiction to hear this appeal under the collateral order doctrine.

II. STANDARD OF REVIEW

This court very recently set out the standard of review for sanctions imposed under Rule 11. In Thomas v. Evans, 880 F.2d 1235, 1239 (11th Cir. 1989), we said that

> "An attorney or a party may be sanctioned under Rule 11 for filing a pleading that: (1) has no reasonable legal basis; (2) has no reasonable factual basis; or (3) is filed for an improper purpose . . . . Regarding the scope of appellate review of Rule 11 sanction, factual determinations and the decision to impose sanctions are within the discretion of the district court and are subject to review only for abuse of that discretion. Donaldson v. Clark, 819 F.2d 1551, 1556 (11th Cir. 1987). Determining whether a pleading or motion is legally sufficient, on the other hand, involves a question of law subject to de novo review. Id."

(citation omitted). See also Westmoreland v. CBS, Inc., 770 F.2d 1168, 1174-75 (D.C. Cir. 1985).

Counsel maintains that he was sanctioned for signing legally deficient complaints and thus, as the sanctions went to the legal sufficiency of the pleadings that he drafted, this court should review the trial court's rulings de novo. We partially disagree. We consider the trial court's finding that the Third Amended Complaint did not conform to the instructions detailed by that court to be a factual determination subject to review for abuse of discretion. Likewise, the trial court's decision to impose sanctions is subject to abuse of discretion review. The conclusion that Counsel unreasonably

signed the Second Amended Complaint including certain defendants on the basis of a legal argument rejected in this Circuit, however, is a decision regarding the legal sufficiency of the complaint that is subject to de novo review.

III. DISCUSSION

A. The Third Amended Complaint

The district court ordered Counsel to do three things to reform the Second Amended Complaint into a Third Amended Complaint. Counsel was to (a) "plead separate counts for each defendant," (b) "plead counts based on defendants' actions in their individual capacities separately from counts based on defendants' actions in their official capacities," and (c) "plead each count and

the facts supporting each count separately." Upon Defendants' motion to dismiss and for sanctions, the trial court found that Counsel had disobeyed the court's order in not pleading separate counts for Defendants' actions taken in their individual capacity versus those taken in their official capacity, and in failing to plead each count and the facts supporting each count separately.

We cannot find that the trial court abused its discretion in determining that Counsel violated the order of November 10, 1987. The style of the case clearly indicates that Defendants were being sued in both their individual and official capacities; each count, however, merely identifies the specific defendant without

any hint of in which capacity the defendant was being held liable. Counsel seeks to justify this apparent disregard for the court's order by his reliance on Kentucky v. Graham, 473 U.S. 159, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985), in which the Supreme Court held that a plaintiff need no longer bring official-capacity actions against local government officials since the local government could now be sued directly. Id. at 167 n. 14, 105 S.Ct. at 3106 n. 14 (citing Monell v. New York City Dept. of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978)). Thus the counts against the Defendants in their official capacities, Counsel maintains, were subsumed in the

counts against the Town, with the remaining counts referring to the Defendants in their individual capacities.

In the abstract, Counsel's reasoning is correct. None of his reasoning, however, is plain or even implicit in the Third Amended Complaint that he filed. Instead, he submitted a complaint styled against Defendants in their individual and official capacities. Counsel later defended his decision to include Defendants as officials as an "excess of caution . . . to avoid the implication that these Defendants did not contribute to the Town's unconstitutional acticns in their official capacities."13/ In other words, the complaint addressed the conduct

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13/ Brief for Plaintiffs-Appellants at 36-37.

of the Defendants as officials and individuals, but without separating out the two capacities in the body of the complaint--directly flouting the district court's order. In such a situation, the district court did not abuse its discretion in ruling that Counsel should be liable for Rule 11 sanctions.[14]

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[14] Counsel also argues that, in fact, attorneys for Defendants were at fault for not abiding by a telephone conversation with Counsel, subsequently memorialized in a letter, in which Counsel explained that the counts were against Defendants in their individual capacities. Counsel asserts that he believed that conversation to clear up any ambiguity regarding the complaint and thus did not see any reason to amend the complaint until Defendants later moved to dismiss the complaint. At that point, Counsel did move the trial court to amend the complaint to clarify the capacity issue. We feel that these actions taken by Counsel are irrelevant to the fact that the Third Amended Complaint, as filed, was completely ambiguous about the capacities in which Defendants were sued, and thus failed to comply with the court order.

Nor did the district court err in finding that Counsel failed to plead each count and the facts supporting each count separately. Counsel attempts to argue that his approach of repeating background facts nine times throughout the complaint and of mingling the activities of various defendants and non-parties in each count, although the court instructed Counsel to separate the facts against each defendant, was, at worst, a reasonable misreading of the trial court's order. We disagree. The court unambiguously requested counsel to "make it clear what administrative activities, if any, are attributable to each defendant"[15/] by sorting out into separate counts what each defendant did in

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15/ Order of November 10, 1987, at 13.

either his official or personal capacity that violated Plaintiffs' rights. We concur in the trial court's finding that "no reasonable reading of the November 10, 1987, Order could have resulted in such pleading"[16] as the Third Amended Complaint, and thus find no abuse of discretion in holding Counsel liable for sanctions.

Having properly found Counsel liable for Rule 11 sanctions, the trial court had discretion to impose a monetary sanction on Counsel.[17]

B. The Second Amended Complaint

Rule 11 states that

> [t]he signature of an attorney . . . constitutes a certificate by the signer that the signer

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16/ Order and Opinion of March 31, 1988, at 6.

17/ See supra, note 5.

> has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it . . . is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.

The existing law on legislative immunity of this Circuit extends the immunity granted by the Supreme Court to federal, state and regional legislators[18/] to local legislators. See e.g., Baytree of Inverrary Realty Partners v. City of Lauderhill, 873 F.2d 1407, 1409 (11th Cir. 1989) (individual defendants have absolute immunity for conduct furthering legislative duties); Espanola Way Corp. v. Meyerson, 690 F.2d 827, 829 (11th Cir.

18/ Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 99 S.Ct. 1171, 59 L.Ed.2d 401 (1979).

1982), cert. denied, 460 U.S. 1039, 103 S.Ct. 1431, 75 L.Ed.2d 791 (1983) (legislative activity to which absolute immunity pertains includes the vote of a city council-person); Hernandez v. City of Lafayette, 643 F.2d 1188, 1192-93 (5th Cir. 1981) ("local legislators are entitled to absolute immunity from suit under § 1983 for conduct in the furtherance of their duties"); Universal Amusement Co., Inc. v. Hofheinz, 616 F.2d 202, 205 (5th Cir. 1980), aff'd in pertinent part, 646 F.2d 996 (1981) (absolute immunity for legislators in the furtherance of their duties; City Councilmembers cannot be held liable). This law is binding on the trial courts in this Circuit.

From the very first motion to dismiss made by Defendants, Defendants have protested that Counsel and Plaintiffs were attempting to hold Defendants liable for actions taken as local legislators on the Zoning Commission and the Town Council for which Defendants were immune under the law of this Circuit. In response to the first motion to dismiss, Counsel cursorily rejected the legislative immunity argument stating that "it is hardly a foregone conclusion . . . that these individual Defendants are entitled to the legislative immunity afforded individuals performing legislative functions at the state or regional level [citing Lake Country Estates]." Instead, Counsel noted that in the First Circuit, under Cutting v.

Muzzey, 724 F.2d 259 (1st Cir. 1984), it was questionable whether the actions taken by Defendants were truly legislative. Nowhere did Counsel even acknowledge that clear precedent supporting Defendants' assertion of legislative immunity existed in this Circuit.

In opposing Defendants' motion to dismiss the Second Amended Complaint, Counsel mentioned in passing that, per Espanola Way, absolute legislative immunity in this Circuit turned on whether the local legislators were "engaging in legislative activity." Id. at 829. Counsel did not further research and discover, or at the very least neglected to note that this Circuit interprets "engaging in legislative activity" to mean

"conduct in the furtherance of [the legislators'] duties," Hernandez, 643 F.2d at 1193, and that, as the trial court found, such activities as voting, debate and reacting to public opinion are manifestly in furtherance of legislative duties. Instead, Counsel discussed law in the Eighth Circuit[19/] which suggested that enacting zoning may sometimes be an administrative rather than a legislative act. Counsel then turned to Cutting to find what he considered the definitive test of when a particular activity is legislative and entitled to absolute immunity.

19/ Gorman Towers, Inc. v. Bogoslavsky, 626 F.2d 607, 611 n. 5 (8th Cir. 1980).

The trial court in its November 10, 1987, order, while recognizing that Cutting did delineate a test for distinguishing between legislative and administrative acts, found that the court was bound to apply the test set out in Hernandez by the Fifth Circuit. The trial court therefore dismissed the Second Amended Complaint to the extent that Plaintiffs attempted to hold Defendants liable for legislative action. Yet Counsel, in opposing the later Motion for Sanctions based in part on the Second Amended Complaint, claimed that he, on behalf of Plaintiffs, had "proposed in good faith a variety of legal arguments which supported [Plaintiffs'] theory of individual liability," and that only in

the November 10 order did the district court conclusively determine what law would govern the case.

Once sanctioned by the district court, Counsel moved for reconsideration of the sanction, contending that the fact patterns of this Circuit's legislative immunity cases did not correspond with the alleged facts of Plaintiffs' case and it was thus inappropriate to apply the standards set out in those cases. Further, Counsel for the first time argued for his right to propose adoption of a legal principle from another circuit even if the legal principle conflicts with the law of this Circuit. Counsel makes essentially the same argument to us on appeal, insisting that the position he had

taken throughout is "warranted by existing law" of the First Circuit, satisfying the requirements of Rule 11.

We first of all oppose Counsel's construction of the phrase "existing law." It is the rare law that does not exist somewhere; usually completely novel theories of law arise only in areas of recent innovation or invention. Otherwise, the question is not whether the law exists, but whether it pertains in the jurisdiction in which the law is being asserted. Jurisdiction A might recognize the tort of "XYZ" which Jurisdiction B does not. A lawyer in B could not in good faith submit a complaint based on an XYZ cause of action asserting that XYZ is the existing law merely because XYZ is a

legitimate cause of action in A. Instead, the lawyer would be required to inform the court that she recognized that XYZ was not yet a cognizable action in B but that she believed that the law of B should be extended, modified, or reversed to incorporate the tort of XYZ. Only then would the lawyer have satisfied her obligations under Rule 11.

We believe that Counsel has a duty to acknowledge at some point, not necessarily within the complaints filed, but certainly in one of the memoranda in opposition to Defendants' motions to dismiss the First and Second Amended Complaints or in a similar document, that the binding precedent of this Circuit disfavored Plaintiffs' position on legislative

immunity. Then Counsel could have in good faith requested the trial court to recognize the law expounded in Cutting because of the alleged factual distinctions between the cases decided in this Circuit and those of the instant case.20/ Instead, Counsel has consistently refused to acknowledge that this Court has rendered decisions on legislative immunity which are binding on his case, only conforming with our decisions when ordered to do so by the district court. His insistence on maintaining a legal stance

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20/ We recognize that two of our sister circuits have rejected the position that we now take. See Mary Ann Pensiero, Inc. v. Lingle, 847 F.2d 90 (3d Cir. 1988); Golden Eagle Distributing Corp. v. Burroughs Corp., 801 F.2d 1531 (9th Cir. 1986), reh. denied, 809 F.2d 584 (1987) (differentiating between arguments warranted by existing law and arguments for extending, modifying or reversing existing law not required by Rule 11).

untenable with our law demonstrates either an ignorance of our law, and thus inadequate research, or some intent to mislead the trial court as to the present state of this Circuit's precedent, and thus bad faith. Signing the complaint in either of the above situations is a violation of Rule 11 and warrants a sanction. Therefore, the district court did not err in ruling that Counsel should be liable for Rule 11 sanctions for insufficient legal research regarding legislative immunity in support of the Second Amended Complaint. Nor did the district court abuse its discretion in imposing a $1000 sanction, that amount being the

approximate cost to the Defendants to respond to the pleading signed in violation of Rule 11.

Accordingly, the district court's order finding Counsel liable for Rule 11 sanctions is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

DESISTO COLLEGE, INC., et al.,

Plaintiffs,

vs.

Case No. 87-1-Civ-Oc-14

THOMAS P. LINE, et al.,

Defendants.

OPINION AND ORDER

This case came on to be heard on Defendant's Motion To Dismiss Plaintiffs' Third Amended Complaint And For Sanctions, filed on January 15, 1988; the Motion To Dismiss Of Alan B. Mills, Jr. In His Individual Capacity, filed on January 13, 1988; and Defendant Thomas P. Line's

Motion To Dismiss Third Amended Complaint Or Alternative Motion For More Definite Statement, filed on January 5, 1988. The plaintiffs responded to the defendants' motion on March 1, 1988, and to both Alan B. Mills' and Thomas P. Line's motions on February 16, 1988. The Court heard oral argument on March 18, 1988.

The Court ordered defendants to submit a supplemental memorandum in support of their motion for sanctions on March 22, 1988. The defendants filed the memorandum on March 28, 1988. Defendant Thomas P. Line filed a memorandum on March 28, 1988.

I. The November 10, 1987, Order

On November 10, 1987, this Court granted defendants' various motions to dismiss the Second Amended Complaint. In

that Order, the Court considered inter alia 1) the exhaustion requirement in Section 1983 causes of action, 2) the proper standard for determining whether or not a local legislator would be absolutely immune from Section 1983 causes of action, and 3) whether or not the Complaint violated Fed.R.Civ.P. 8(a) & (e) due to its excessive length. The Court did not, however, consider the merits of plaintiffs' Section 1983 claim.

The Court found that the Second Amended Complaint stated causes of action against some of the defendants in their individual capacities for their legislative acts. In particular, the Court found that the defendants were absolutely immune for their conduct connected with enacting Ordinances 160,

161, and 162. The Court also found that the issuance of citations and denial of building permits were administrative acts for which the defendants could not claim absolute legislative immunity.1/

The Court also found that the Second Amended Complaint did not violate Fed.R.Civ.P. 8 due to its excessive length. The Court stated that,

> [t]he number of parties and the complexity of the case, however, justifies the length of the complaint. Indeed, defendants should welcome the specificity of the complaint insofar as they are put on notice of the theory that plaintiffs seek to prove.

1/ Contrary to plaintiff's suggestion, the Court did not consider whether or not the denial of a change of use permit was or was not a legislative act. This question was not briefed or otherwise presented to the Court.

The Court did, however, find that the format of the Second Amended Complaint could be altered to clarity the claims against each defendant. Towards this end the Court ordered the plaintiffs to restructure the Second Amended Complaint as follows:

> 5. The Second Amended Complaint shall be restructured as follows:
>
> > a. The plaintiffs shall plead each count and the facts supporting each count separately.
> >
> > b. The plaintiffs shall plead separate counts for each defendant.
> >
> > c. The plaintiffs shall plead counts based on defendants' actions in their individual capacities separately from counts based on defendants' actions in their official capacities.

II. The Third Amended Complaint

The Court finds that the Third Amended Complaint violates this Court's November 10, 1987, Order in two ways. First, plaintiffs failed to separate counts based on defendants' actions taken in their individual capacities from those counts based on defendants' actions taken in their official capacities. The Third Amended Complaint contains a single count against each individual defendant. The style of the case, however, indicates that the defendants are being sued in both their individual and official capacities. Accordingly, the Complaint on its face indicates that the plaintiffs once again

seek to hold the defendants liable for the same conduct in both their official and personal capacities.2/

The second violation of this Court's November 10, 1987, Order is that plaintiffs have failed to plead each count and the facts supporting each count separately. The Court's express purpose for requiring plaintiff to separate the counts against each defendant was to clarify the claims before the Court. Towards this end, the Court gave plaintiff directions on what these supporting facts should have been. The Court stated that each of these separate counts should be

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2/ Plaintiff moved to amend the Third Amended Complaint on January 25, 1988, presumably to change the caption of the Complaint. This motion was filed after defendants had already filed their instant motions to dismiss. Therefore, defendants had already suffered prejudice from the violation of the November 10, 1987, Order.

"based on defendants' actions" in either their official capacities or individual capacities. The Court finds that the Third Amended Complaint does not state what actions plaintiffs claim have unconstitutionally deprived them of protected interests. Rather, the Complaint once again lumps all of the defendants' actions together nine times.

Plaintiffs apparently interpreted the November 10, Order as requiring them to repeat the introductory parts of the complaint for each count rather than incorporating these facts by reference. Such an interpretation of the Court's Order in this way is hard to understand. Pleading of that kind resulted in a Complaint that repeated some six to seven typed pages of "background" matters in

almost every one of the Complaint's nine counts. As a result, the Third Amended Complaint spanned some 105 pages and 556 paragraphs. The Court never expressed any necessity for such needless and obscuring repetition.

The Court finds that the Third Amended Complaint has not clarified the claims before the Court but has further obscured them. The Complaint fails to clearly identify the conduct of each defendant that the plaintiffs claim has violated their constitutional rights. To the contrary, the Complaint makes it impossible to discern that conduct.3/

3/ The clearest example of the Complaint's failure to clarify the conduct that the plaintiffs state is unconstitutional is presented in Counts VII, VIII, and IX. These are the claims against Arthur Pratt, Rodney T. Griffin, and Alan B. Mills Jr. respectively. The following language appears
(footnote continued)

Furthermore, the Court finds that no reasonable reading of the November 10, 1987, Order could have resulted in such pleading.

(footnote continued from previous page)
in each of these counts in paragraphs 424, 490 and 555 respectively:

> By denying the College's "change of use" application, and by taking the other actions described above, Defendant [Pratt, Griffin, and Mills have] attempted to drive DeSisto College and its handicapped students out of the Town of Howey . . . .

The defendants and this Court cannot reasonably be expected to divine what "other action" plaintiffs allege has deprived them of protected rights. Indeed, at oral argument, plaintiffs admitted that at least as to defendants Griffin and Mills, that there were no "other actions" and the only conduct they meant to cite was the denial of the change of use application. The Court believes that by clarifying the conduct plaintiffs claim has deprived them of protected interests, defendants will be able to file a workable answer to the claims made against them.

Plaintiffs suggest that this violation of the Court's November 10, 1987, Order is merely technical and curable by simple amendment. The Court disagrees that the violation is a technical one. The Court finds that the Complaint's failure to clarify the capacities in which the defendants are sued and the needless repetition of background serves to obscure the claims made by plaintiff. The Court finds that the defendants cannot reasonably answer this Complaint. To avoid further delay and hopefully expedite the presentation of the substantive issues, the Court will give further instructions on pleading the Fourth Amended Complaint.

III. Instructions For Pleading The Fourth Amended Complaint

The Court will once again require plaintiffs to plead separate counts for each defendant. Furthermore, the Court shall once again require plaintiffs to plead counts based on defendants actions in their individual capacities separately from counts based on defendants' actions in their official capacities. The Court would expect that the plaintiffs would also amend the style of the Complaint so as to remove any reference to suit against the defendants in their official capacities. Plaintiffs have agreed that it is unnecessary to plead counts against the defendants in their official capacities where they have alleged such violations against the town.

The Court will once again require the plaintiffs to plead each count and the facts supporting each count separately. In particular, the plaintiffs shall specify that conduct which the plaintiffs allege has violated their constitutional rights. This conduct shall be stated with specificity. The plaintiffs may give background if they so choose, however, this background shall not be included in the counts of the Complaint. Plaintiffs may if they choose incorporate background facts by reference in each count. This background may be incorporated, however, with the understanding that none of the background will constitute a factual basis for the cause of action. It has been the Court's experience that a single count may be plead in two pages or less.

The Court shall also require the plaintiffs to plead plaintiff Horner's claims in counts separate from plaintiff DeSisto College's claims.4/ This requirement should help the Court distinguish the respective plaintiffs' rights claimed to be protected by the Constitution.

To further clarify plaintiffs' claims, the Court will require plaintiffs to plead each alleged constitutional violation separately. The plaintiffs couch their claims on theories of substan-

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4/ The additional instructions on pleading the Fourth Amended Complaint should not prejudice plaintiffs at this stage of the litigation. Plaintiffs stated at oral argument that they have completed discovery. Defendants stated that they are nearly complete. Furthermore, it has been over a year since the original Complaint in this action was filed. Accordingly, plaintiffs had adequate time to prepare their case. At this late date plaintiffs should be able to provide this Court and the defendants with the specificity required by these additional instructions.

tive due process, procedural due process, and equal protection of the laws. Pleading of each of these violations separately will serve to distinguish them from one another and permit the Court to more easily analyze each constitutional issue.

The Court would find it particularly helpful if in pleading their due process claims plaintiff would specify plaintiffs' alleged liberty or property interest and how defendants' conduct has deprived them of such interests. Similarly, in pleading the equal protection counts plaintiff should indicate the parties that are similarly situated to the plaintiffs who have been treated differently from plaintiffs by the defendants for no rational reason. Such pleading should

serve the purpose of clarifying the injuries plaintiffs have allegedly sustained.

IV. Sanctions

The defendants argue that plaintiffs' counsel, Roderick MacLeish Jr., signed the Third Amended Complaint without having carefully read this Court's November 10, 1987, Order in violation of Fed.R.Civ.P. 11. Defendants also argue that Mr. MacLeish signed the Second Amended Complaint without having carefully researched the law of legislative immunity of the Eleventh Circuit Court of Appeals.

Fed.R.Civ.P. 11 provides in pertinent part as follows:

> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief

> formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law . . . .

The Court finds that Mr. MacLeish signed the Second Amended Complaint without first having reasonably researched the law of legislative immunity of the Eleventh Circuit Court of Appeals. Had Mr. MacLeish done sufficient research, he would have discovered clear precedent saying that a member of a town counsel is absolutely immune from liability based on conduct in furtherance of the member's duties. See Espanola Way Corp. v. Meyerson, 690 F.2d 827, 829 (11th Cir. 1982), cert. denied, 460 U.S. 1039 (1983); Hernandez v. City of Lafayette, 643 F.2d 1188, 1193 (5th Cir. 1981); Universal

Amusement Co. Inc. v. Hofheinz, 616 F.2d 202, 205 (5th Cir. 1980). The only case even colorably to the contrary relied on by Mr. MacLeish was Cutting v. Muzzey, 724 F.2d 259, 261 (1st Cir. 1984). The Court would remind Mr. MacLeish that although he practices law in the First Circuit, that this Court is bound by Eleventh Circuit precedent. Mr. MacLeish's reliance on Cutting was, therefore, unreasonable and could not have been conducted after reasonable inquiry.

In determining whether or not defendants Washo and Purser were included in the Second Amended Complaint, the Court is also mindful of the purpose of Fed.R.Civ.P. 11. As stated in Southern Leasing Partners, Ltd. v. McMullan, 801 F.2d 783, 788 (5th Cir. 1986),

> [i]f Rule 11 is to mean anything and we think it does, it must mean an end to such expeditionary pleadings. '[T]his 'shotgun approach' to pleadings, . . . where the pleader heedlessly throws a little bit of everything into his complaint in the hopes that something will stick, is to be discouraged.'

Id. (citations omitted). It appears that defendants Washo and Purser were included as defendants in such a "shotgun approach."

For the aforementioned reasons, the Court finds that Mr. MacLeish's inclusion of defendants Carlin Washo and John P. Purser, III in the Second Amended Complaint was also done absent reasonable inquiry.

The Court further finds that Mr. MacLeish signed the Third Amended Complaint without first having carefully read the Complaint in light of this

Court's November 10, 1987, Order. The Court has already detailed plaintiffs' failure to separate the counts against the defendants in their individual capacities from those counts against defendants in their official capacities. The Court has also examined plaintiffs' failure to separate counts for each defendant and specify defendants' actions that have allegedly deprived plaintiffs of protected interests. Finally, the Court has expressed its dismay at plaintiffs' needless and obscuring repetition of "background" facts. Accordingly, the Court will impose sanctions on Mr. MacLeish for signing the Second Amended Complaint and the Third Amended Complaint without having conducted a reasonable inquiry.

In determining the amount of the sanction, the Court is once again guided by Fed.R.Civ.P. 11. That rule states that the sanction "may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading . . . including a reasonable attorney's fee."

Defendants state in their supplementary memoranda that the amount expended on the motion to dismiss the Second Amended Complaint insofar as that amount can be allocated to the claims made against defendants Washo and Purser was $1,714.00. Defendants also state that the amount defendants expended on costs and attorney's fees on the motion to dismiss the Third Amended Complaint totalled some

$32,351.52. Defendant Thomas P. Line states that an additional $535.00 was spent to respond to the Third Amended Complaint for his individual defense.

The Court finds that the amount of the sanction should reflect the amount spent by the Defendants to respond to pleadings signed in violation of Fed.R.Civ.P. 11. The sanction should also reflect a figure that will compensate the defendants for in effect doing much of the legal research for plaintiffs' counsel. The Court will not award an amount reflecting the total amount spent in that much of this expenditure needed to have been spent regardless of the violation of Fed.R.Civ.P. 11. Much of the legal research expense, for example, reflects research on issues unrelated to the

violations of Fed.R.Civ.P. 11. This research may certainly be reused for preparation of the next motion to dismiss or for summary judgment.

In light of the aforementioned considerations, the Court finds that Mr. MacLeish should pay $1,000.00 as a sanction to defendants Washo and Purser for filing of the Second Amended Complaint in violation of Fed.R.Civ.P. 11. In addition, the Court finds that Mr. MacLeish should pay the remaining defendants $5,000.00 as a sanction for filing the Third Amended Complaint in violation of Fed.R.Civ.P. 11 and this Court's Order. Both of these sanctions should be paid to counsel for the defendants within twenty (20) days of the date of this Order. Defendants' counsel

may then at the option of their clients apply the sanction to future fees charged in this case or in the alternative distribute the sanction to the parties in the proportions those parties paid attorney's fees and costs in this litigation to date.

Accordingly, it is

ORDERED:

1. That Defendant's Motion To Dismiss Plaintiffs' Third Amended Complaint And For Sanctions, filed on January 15, 1988, is granted.

2. That the Motion To Dismiss Of Alan B. Mills, Jr. In His Individual Capacity, filed on January 13, 1988, is granted.

3. That Defendant Thomas P. Line's Motion To Dismiss Third Amended Complaint Or Alternative Motion For More Definite Statement, filed January 5, 1988, is granted.

4. That the Third Amended Complaint filed on December 7, 1987, is hereby dismissed with leave for plaintiff to file a Fourth Amended Complaint within twenty (20) days of the date of this Order in accordance with this Order.

5. Defendants shall have twenty (20) days after the filing of the Complaint to file an answer.5/

5/ The Court would suggest if at all possible that the defendants answer. Defendants may file any other motions they may wish to file, such as a motion for summary judgment, after answering.

6. That plaintiffs' counsel, Roderick MacLeish, shall pay defense counsel $6,000.00 as a sanction in this case.

7. Defense counsel shall apply the funds paid by Mr. MacLeish in accordance with this Order.

DONE AND ORDERED at Jacksonville, Florida this 31 day of March, 1988.

/s/ Susan H. Black
UNITED STATES DISTRICT JUDGE

Copies to:

Counsel of Record